

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

FRANCISCO JAVIER VARGAS, JR.,

Plaintiff,

v.

JOSIE GONZALES, et al.,

Defendants.

No. 2:21-cv-1839 AC P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983.

I. Three Strikes Analysis

Plaintiff seeks leave to proceed in forma pauperis under 28 U.S.C. § 1915(a). ECF Nos. 2, 6. The Prison Litigation Reform Act of 1995 (PLRA) permits any court of the United States to authorize the commencement and prosecution of any suit without prepayment of fees by a person who submits an affidavit indicating that the person is unable to pay such fees. However,

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g). The plain language of the statute makes clear that a prisoner is precluded

from bringing a civil action or an appeal in forma pauperis if the prisoner has brought three frivolous actions and/or appeals (or any combination thereof totaling three). Rodriguez v. Cook, 169 F.3d 1176, 1178 (9th Cir. 1999). “[Section] 1915(g) should be used to deny a prisoner’s [in forma pauperis] status only when, after careful evaluation of the order dismissing an action, and other relevant information, the district court determines that the action was dismissed because it was frivolous, malicious or failed to state a claim.” Andrews v. King, 398 F.3d 1113, 1121 (9th Cir. 2005). Dismissal counts as a strike under § 1915(g) “when (1) a district court dismisses a complaint on the ground that it fails to state a claim, (2) the court grants leave to amend, and (3) the plaintiff then fails to file an amended complaint” regardless of whether the case was dismissed with or without prejudice. Harris v. Mangum, 863 F.3d 1133, 1142-43 (9th Cir. 2017).

Inspection of other cases filed by plaintiff has led to the identification of at least four cases that qualify as strikes. The court takes judicial notice of the following lawsuits filed by plaintiff:¹

1. Vargas v. California Department of Corrections and Rehabilitation, E.D. Cal. No. 2:18-cv-2112 MCE DMC (first amended complaint dismissed with leave to amend for failure to state a claim (ECF No. 16), case dismissed on August 7, 2019, for failure to file an amended complaint (ECF No. 28));
2. Vargas v. Warden CSP-Corcoran, E.D. Cal. No. 2:19-cv-0892 MCE DB (first amended complaint dismissed with leave to amend for failure to state a claim (ECF No. 8), case dismissed on October 30, 2019, for failure to file an amended complaint (ECF No. 14));
3. Vargas v. Gonzales, E.D. Cal. No. 1:20-cv-1634 AWI EPG (case dismissed on April 2, 2021, as frivolous (ECF No. 18));
4. Vargas v. Gonzales, C.D. Cal. No. 2:20-cv-0667 CJC SK (case dismissed on March 4, 2020, as frivolous and for lack of jurisdiction because the “Court has no jurisdiction to

¹ The court “may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.” United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992) (citation and internal quotation marks omitted) (collecting cases); Fed. R. Evid. 201(b)(2) (court may take judicial notice of facts that are capable of accurate determination by sources whose accuracy cannot reasonably be questioned).

entertain complaints with allegations that are fanciful, frivolous, or far-fetched.” (ECF No. 8)).

All of the preceding cases were dismissed in advance of the October 4, 2021 filing of the instant action, and none of the strikes have been overturned. Therefore, this court finds that plaintiff is precluded from proceeding in forma pauperis unless he is “under imminent danger of serious physical injury.” 28 U.S.C. § 1915(g). To satisfy the exception, plaintiff must have alleged facts that demonstrate that he was “under imminent danger of serious physical injury” at the time of filing the complaint. Andrews v. Cervantes, 493 F.3d 1047, 1053 (9th Cir. 2007) (“[I]t is the circumstances at the time of the filing of the complaint that matters for purposes of the ‘imminent danger’ exception to § 1915(g).”).

The complaint alleges that plaintiff has been subjected to unauthorized surveillance, interference with his mail, sexual harassment in the form of indecent exposure and exposure to pornography, and general harassment. ECF No. 1. There are no allegations that would demonstrate an imminent risk of serious physical injury at the time of filing, and the undersigned will therefore recommend that plaintiff be required to pay the filing fee in full or have the complaint dismissed.

II. Request for Counsel

Plaintiff has also requested the appointment of counsel. ECF No. 7. The United States Supreme Court has ruled that district courts lack authority to require counsel to represent indigent prisoners in § 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989). In certain exceptional circumstances, the district court may request the voluntary assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990).

“When determining whether ‘exceptional circumstances’ exist, a court must consider ‘the likelihood of success on the merits as well as the ability of the [plaintiff] to articulate his claims *pro se* in light of the complexity of the legal issues involved.’” Palmer v. Valdez, 560 F.3d 965, 970 (9th Cir. 2009) (quoting Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983)). The burden of demonstrating exceptional circumstances is on the plaintiff. Id. Circumstances common to

1 most prisoners, such as lack of legal education and limited law library access, do not establish
2 exceptional circumstances that would warrant a request for voluntary assistance of counsel.

3 In light of the recommendation that plaintiff's applications to proceed in forma pauperis
4 be denied, appointment of counsel is not warranted at this time.

5 III. Plain Language Summary of this Order for a Pro Se Litigant

6 You have at least three strikes under § 1915(g) and cannot be granted in forma pauperis
7 status unless you show the court that you were in imminent danger of serious physical injury at
8 the time you filed the complaint. You have not shown that you were in imminent danger of
9 serious physical injury and so it is being recommended that your motion to proceed in forma
10 pauperis be denied and you be required to pay the whole filing fee at one time.

11 Accordingly, IT IS HEREBY ORDERED that:


12 1. Plaintiff's motion for appointment of counsel (ECF No. 7) is DENIED.

13 2. The Clerk of the Court shall randomly assign a United States District Judge to this
14 action.

15 IT IS FURTHER RECOMMENDED that plaintiff's motions to proceed in forma pauperis
16 (ECF Nos. 2, 6) be DENIED and plaintiff be ordered to pay the entire \$402.00 in required fees
17 within thirty days or face dismissal of the case.

18 These findings and recommendations are submitted to the United States District Judge
19 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
20 after being served with these findings and recommendations, plaintiff may file written objections
21 with the court. Such a document should be captioned "Objections to Magistrate Judge's Findings
22 and Recommendations." Plaintiff is advised that failure to file objections within the specified
23 time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153
24 (9th Cir. 1991).

25 DATED: April 19, 2022

26 
27 ALLISON CLAIRE
28 UNITED STATES MAGISTRATE JUDGE